UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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DORCAS-COTHY KABASELE, an individual,[1]

Plaintiff,

v.

ULTA SALON, COSMETICS & FRAGRANCE, INC.; and DOES 1-100, inclusive,

Defendant.

No. 2:21-cv-01639 WBS CKD

MEMORANDUM AND ORDER RE: PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION AND PAGA SETTLEMENT[2]

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Plaintiff Dorcas-Cothy Kabasele, individually and on behalf of similarly situated individuals, brought this putative class action against defendant Ulta Salon, Cosmetics, & Fragrance, Inc. ("Ulta"), alleging violations of California wage

[1] Although the caption on the operative complaint refers to plaintiff only as "an individual," plaintiff asserts claims both individually and on behalf of similarly situated Ulta employees.

[2] The motion is decided on the papers without further oral argument pursuant to Local Rule 230(g).

and hour laws. (See Third Am. Compl. ("TAC") (Docket No. 23).) Before the court is plaintiff's unopposed motion for preliminary approval of a class action settlement. (See Mot. for Prelim. Approval ("Mot.") (Docket No. 34); Def.'s Notice of Non-Opp'n (Docket No. 36).)

I. Background and Proposed Settlement

According to the allegations of the Third Amended Complaint, defendant Ulta employed plaintiff and other proposed class members as hourly-paid or non-exempt employees. (See TAC ¶ 10.) Plaintiff brought this action for (1) failure to pay minimum wages; (2) failure to pay overtime wages; (3) failure to provide meal breaks; (4) failure to provide rest breaks; (5) failure to pay sick pay; (6) failure to furnish accurate itemized wage statements; (7) failure to pay wages due at end of employment; (8) failure to indemnify all necessary business expenditures; (9) violation of California's Unfair Competition Law, California Business & Professions Code § 17200 et seq.; and (10) penalties under California's Private Attorneys General Act of 2004 ("PAGA"), Cal. Lab. Code § 2698 et seq. (See TAC.)

This is one of four actions against defendant Ulta covering similar class and PAGA claims. The other actions are Gonzalez v. Ulta Salon Cosmetics & Fragrance, Inc., No. 2:22-cv-00363 AB RAO (C.D. Cal.), a federal class and PAGA action; Arellano v. Ulta Salon, Cosmetics and Fragrance, Inc., No. 5:22-cv-00639 JGB KK (C.D. Cal.), a federal class action; and Arellano v. Ulta Salon, Cosmetics and Fragrance, Inc., No. CIVSB2209151 (San Bernardino Super. Ct.), a state PAGA action.

The proposed settlement would dispose of all four

actions.[3] All parties agreed to seek settlement approval only in this action; once the settlement receives final approval in this action and all class payments are distributed, counsel in the Gonzalez and Arellano actions (state and federal) will voluntarily dismiss their cases. (See Settlement Agreement (Docket No. 34-2 at 18-53) ¶ 9.8.)

The putative class consists of all current and former hourly-paid or non-exempt employees of defendant statewide who worked for Ulta between October 12, 2019 and November 8, 2022. (Id. ¶ 1.6.) There are approximately 18,711 individuals in the putative class. (Def.'s Suppl. Br. (Docket No. 42) at 8.) The parties propose a gross settlement amount of $1,500,000, which includes the following: (1) $5,000 incentive awards for the three lead plaintiffs and $500 for each remaining named plaintiff, for a total of $27,000 in plaintiff incentive awards[4]; (2) maximum attorneys' fees of $500,000, or 33.33% of the gross settlement amount; (3) settlement administration costs of approximately $65,000; and (4) $50,000 for PAGA penalties, of which 75% (i.e., $37,500) will be distributed to the Labor and Workforce

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[3] Plaintiff's motion sought leave to amend the operative complaint to join the named plaintiffs from these other actions. Because the court denies the motion for preliminary approval, leave to amend the complaint is denied at this time. Plaintiff should include a renewed request to amend the complaint in any future motion for preliminary approval.

[4] The motion for preliminary approval originally indicated that the incentive awards would total $28,500. The parties later indicated that they will no longer seek to have three of the named plaintiffs from the Gonzalez action designated as class representatives due to non-responsiveness. (See Docket No. 38.) This would decrease the incentive awards by $500 each, or $1,500, resulting in total incentive awards of $27,000.

Development Agency ("LWDA") and the remaining 25% will be distributed to individual class members. (See Settlement Agreement ¶¶ 1.5, 1.13, 1.16, 1.21, 1.31.) After deduction of the incentive awards, fees, costs, and the LWDA's share of penalties, the net settlement amount would be approximately $870,500, to be distributed to class members pro rata based on their number workweeks during the class period. (See id.)

The settlement would release defendant from any and all class claims that were pled or could have been pled based on the factual allegations in the operative or prior complaints, and any and all PAGA claims for civil penalties premised on the released class claims. (See id. ¶¶ 1.26, 1.27.)

A hearing on this unopposed motion for preliminary approval was set for March 6, 2023. Due to what was said to be an error in the briefing identified by counsel during the hearing, the court declined to hear further oral argument at that time. The court subsequently issued an order explaining its evaluation of the initial briefing and ordered the parties to submit supplemental briefing. See Kabasele v. Ulta Salon, Cosmetics, & Fragrance, Inc., No. 2:21-cv-01639 WBS CKD, 2023 WL 2842973, at *2 (E.D. Cal. Mar. 14, 2023).

II. Legal Standards

Federal Rule of Civil Procedure 23(e) provides that "[t]he claims, issues, or defenses of a certified class may be settled . . . only with the court's approval." Fed. R. Civ. P. 23(e). The approval of a class action settlement takes place in two stages. In the first stage, "the court preliminarily approves the settlement pending a fairness hearing, temporarily

certifies a settlement class, and authorizes notice to the class." Ontiveros v. Zamora, No. 2:08-cv-567 WBS DAD, 2014 WL 3057506, at *2 (E.D. Cal. July 7, 2014). In the second, the court will entertain class members' objections to (1) treating the litigation as a class action and/or (2) the terms of the settlement agreement at the fairness hearing. Id.

At the preliminary approval stage, the district court must "carefully consider 'whether a proposed settlement is fundamentally fair, adequate, and reasonable,' recognizing that '[i]t is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness . . . .'" Staton, 327 F.3d at 952 (quoting Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998)), overruled on other grounds by Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011). District courts "review and approve" settlement of PAGA claims under a similar standard. See Cal. Lab. Code § 2669(k)(2); Jordan v. NCI Grp., Inc., No. cv-161701 JVS SP, 2018 WL 1409590, at *2 (C.D. Cal. Jan. 5, 2018) (collecting cases); Ramirez v. Benito Valley Farms, LLC, No. 16-cv-04708 LHK, 2017 WL 3670794, at *2 (N.D. Cal. Aug. 25, 2017).

At the preliminary approval stage, "the court need only determine whether the proposed settlement is within the range of possible approval," Murillo, 266 F.R.D. at 479 (quoting Gautreaux v. Pierce, 690 F.2d 616, 621 n.3 (7th Cir. 1982)), and resolve any "glaring deficiencies" in the settlement agreement before authorizing notice to class members, Ontiveros, 2014 WL 3057506, at *12 (citing Murillo, 266 F.R.D. at 478). This generally requires consideration of "whether the proposed settlement

discloses grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representatives or segments of the class, or excessive compensation of attorneys." Murillo, 266 F.R.D. at 479 (quoting West v. Circle K Stores, Inc., No. 2:04-cv-438 WBS GGH, 2006 WL 1652598, at *11-12 (E.D. Cal. June 13, 2006)).

"Courts have long recognized that 'settlement class actions present unique due process concerns for absent class members.'" In re Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 946 (9th Cir. 2011) (quoting Hanlon, 150 F.3d at 1026). Accordingly, settlements reached prior to formal class certification "must withstand an even higher level of scrutiny . . . before securing the court's approval as fair." Id.

III. Discussion

"In determining whether the amount offered in settlement is fair, the Ninth Circuit has suggested that the Court compare the settlement amount to the parties' 'estimates of the maximum amount of damages recoverable in a successful litigation.'" Litty v. Merrill Lynch & Co., No. 14-cv-0425 PA PJW, 2015 WL 4698475, at *9 (C.D. Cal. Apr. 27, 2015) (quoting In re: Mego Fin. Corp. Sec. Litig., 213 F.3d 454, 459 (9th Cir. 2000), as amended (June 19, 2000)); see also Almanzar v. Home Depot U.S.A., Inc., No. 2:20-cv-0699 KJN, 2022 WL 2817435, at *11 (E.D. Cal. July 19, 2022) (citing Rodriguez v. W. Publ'g Corp., 563 F.3d 948, 964 (9th Cir. 2009)) ("In determining whether the amount offered is fair and reasonable, courts compare the proposed settlement to the best possible outcome for the class.")

Plaintiff's counsel estimates that the "maximum"

possible value of the claims is $26,379,927. (See Decl. of Robert J. Wasserman ("Wassmerman Decl.") (Docket No. 34-2) ¶ 13.) This includes $8,950,000 in statutory PAGA penalties.[5] Based on the defendant's arguments and potential defenses, plaintiff's counsel provides a discounted, "realistic" value of the claims. Counsel discounts the minimum wage, overtime, and business reimbursement claims by 50%; and the unpaid meal and rest break premium, wage statement, and waiting time claims by 75%. (Id. ¶ 27.) This results in a total of $7,474,362 in "realistic" recovery. (See id.)

The gross settlement amount of $1,500,000 constitutes 5.7% of the projected "maximum" possible recovery.[6] Even looking solely at the non-PAGA portion of the settlement, the gross settlement amount constitutes 8.3% of the projected maximum recovery for the underlying wage and hour claims.[7] Both percentages are lower than is typically approved. Kabasele, 2023 WL 2842973, at *2 (collecting cases).[8]

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[5] Based on these figures, the maximum possible non-PAGA recovery is $17,429,927.

[6] This figure results from $1,500,000 divided by $26,379,927.

[7] This figure results from $1,450,000 divided by $17,429,927.

[8] See Cavazos v. Salas Concrete, Inc., No. 1:19-cv-00062 DAD EPG, 2022 WL 2918361, at *6 (E.D. Cal. July 25, 2022) (collecting cases) (noting that settlement constituting 5.8% of maximum exposure was "below the general range of percentage recoveries that California courts--including this one--have found to be reasonable," but granting preliminary approval because "a larger recovery . . . would likely not be possible due to defendant's financial condition"); Almanzar v. Home Depot U.S.A., Inc., No. 2:20-cv-0699 KJN, 2022 WL 2817435, at *12 (E.D. Cal.

Due to the combination of what appeared to be a relatively low settlement amount and the conclusory reasoning offered in plaintiff's counsel's motion, the court ordered the parties to submit supplemental briefing. (See Docket No. 40.) The court made clear that the original motion was deficient not because the terms of the settlement were inherently unfair, but because the information offered by counsel did not allow the court to adequately assess the settlement. Unfortunately, counsel has failed to cure these defects despite the opportunity to submit supplemental briefing.

As stated above, the court's task in evaluating a settlement's terms includes comparing the settlement amount with "estimates of the maximum amount of damages recoverable in a

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July 19, 2022) (denying preliminary approval because proposed settlement including 8% of projected value of non-PAGA wage and hour claims was below the range typically approved and plaintiff needed to "better explain the reasonableness" of the proposed recovery); Hunt v. VEP Healthcare, Inc., No. 16-cv-04790 VC, 2017 WL 3608297, at *1 (N.D. Cal. Aug. 22, 2017) (denying preliminary approval of settlement constituting 4.3% of maximum possible exposure, noting that "[i]f a defendant is to receive a discount of this magnitude, there must be good reasons why," which "must be explained thoroughly at the preliminary approval stage . . . to allow the district court to carefully evaluate the strength of the claims, the risks of litigating those claims all the way through, and the value of the relief each class member will receive from the settlement"); O'Connor v. Uber Techs., Inc., 201 F. Supp. 3d 1110, 1129, 1132, 1132 n.18, 1135 (N.D. Cal. 2016) (collecting cases) (denying preliminary approval of settlement constituting 5% of the value of all claims and 10% of the value of non-PAGA wage and hour claims, which was on "the low end of reasonable recovery"); Balderas v. Massage Envy Franchising, LLC, No. 12-cv-06327 NC, 2014 WL 3610945, at *5 (N.D. Cal. July 21, 2014) (collecting cases) (because gross settlement amount constituting 8% of the maximum possible recovery was "especially low," the court stated that counsel needed to provide additional explanation for the settlement amount at final approval).

successful litigation." See In re: Mego Fin. Corp. Sec. Litig., 213 F.3d at 459. Based on the parties' supplemental briefs, the fatal defect here seems to be that plaintiff's motion proffered a "grossly inflated" estimate of the maximum value of the claims that was conceived purely for settlement negotiation purposes. (See Def.'s Suppl. Br. at 17; Pl.'s Suppl. Br. (Docket No. 41) at 5.) Defendant -- which does not oppose the motion -- candidly states that many of the assumptions made by plaintiff's counsel in reaching the "maximum" estimate are "not based on any evidentiary support," leading to a figure that far overstates the value of the claims. (See Def.'s Suppl. Br. at 28.) It appears that even if plaintiff was completely successful in litigating the case through class certification and trial, it would be impossible for her to recover the "maximum" amount suggested by plaintiff's counsel. This "maximum" estimate is therefore useless to the court in evaluating the settlement.

In trying to justify this figure, plaintiff's supplemental brief repeatedly underlines, bolds, and italicizes the word "maximum" as if to suggest the court somehow overlooked or misunderstood this descriptor as used in plaintiff's motion. The court understands the meaning of the word "maximum," but questions whether counsel understands how that concept is appropriately applied at this stage of the litigation. "Maximum" refers to the factually grounded value of the claims that plaintiff could actually recover if successful in litigating the case. Counsel has clearly failed to provide such an estimate.

It is possible that the "realistic" estimate offered by plaintiff's counsel is a more accurate representation of the true

value of the claims that could be recovered in successful litigation. However, the parties have provided the court no means of making this determination. The "realistic" estimate appears to have been calculated by merely taking a percentage discount off the purported "maximum" estimate. An estimate of the true value of plaintiff's claims -- whether styled as "maximum" or a "realistic" value -- must be calculated based on the facts known to the parties, including the number of putative class members subject to each type of violation and the frequency of violations against those individuals.

The court appreciates that defendant's counsel has made a greater effort than plaintiff's counsel to explain the relevant facts to the court. Defendant analyzes the multiple flawed assumptions that led to the "grossly inflated" estimate of the "maximum" value offered by plaintiff. If defendant had taken its analysis one step further and provided an accurate estimate of the true value of the claims, the court might have been able to adequately assess the settlement for purposes of preliminary approval.

As the court emphasized in its prior order, "'[b]alancing the class's potential recovery against the amount offered in settlement is perhaps the most important factor to consider in preliminary approval, not a hollow exercise in which the Court blindly accepts the parties' unsupported assertions.'" See Kabasele, 2023 WL 2842973, at *2 (quoting Beltran v. Olam Spices & Vegetables, Inc., No. 1:18-cv-01676 SAB, 2020 WL 2850211, at *8 (E.D. Cal. June 2, 2020)). Here, the court must conclude that plaintiff has failed to adequately establish that

the proposed settlement is fair, reasonable, and adequate such that preliminary approval is warranted. Accordingly, the motion for preliminary approval will be denied. Any future motion for preliminary approval and seeking class certification should, among other things, provide sufficient factual background to enable the court to meaningfully evaluate the settlement.

IT IS THEREFORE ORDERED that plaintiff's motion for preliminary approval of the class action and PAGA settlement (Docket No. 34) be, and hereby is, DENIED WITHOUT PREJUDICE to submission of a new motion consistent with the discussion in this Order.

Dated: April 12, 2023

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE